

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
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Opinion No. 03-003

Practical Training for Funeral Director License Applicants

QUESTION

Whether the two (2) years of practical training and experience required of an applicant for a funeral director's license by Tenn. Code Ann. § 62-5-305 must take place within the State of Tennessee.

OPINION

It is the opinion of this Office that the practical training and experience required of applicants for a funeral director's license may occur outside the State of Tennessee, provided that such apprenticeship occurs under the personal supervision and instruction of a funeral director licensed in Tennessee.

ANALYSIS

This opinion addresses whether the practical training and experience ("apprenticeship") required of an applicant for a funeral director's license by Tenn. Code Ann. § 62-5-305 must take place within the State of Tennessee. Subsection (a)(6) of that statute provides:

(A) That the applicant either has satisfactorily completed a course of study in a mortuary school approved by the board, and has had one (1) year of practical training and experience of a character satisfactory to the board, in regular, bona fide, full-time employment under the personal supervision and instruction of a *licensed funeral director in this state*; or

(B) In lieu of study in such mortuary school, that the applicant has had such practical training and experience of not less than two (2) years and that, during such period, the applicant has assisted in at least twenty-five (25) funerals.

Tenn. Code Ann. § 62-5-305(a)(6) (emphasis added).

Statutory Construction

Tenn. Code Ann. § 62-5-305(a)(6)(A) is ambiguously worded, and while it may be read to mandate that the one (1) year of practical training and experience is to occur **in this state**, a better interpretation of this subsection would be that the apprenticeship is to occur under the personal supervision and instruction of a **funeral director licensed in this state**. Although the statute is not expressly written in the latter manner, the usual rule of English grammar is to construe a prepositional phrase to modify the words in immediate proximity to it in the sentence. This would indicate that the prepositional phrase “in this state” should be read to modify “licensed funeral director” by describing where the supervising funeral director is to be licensed, rather than to modify “practical training and experience” by describing where such apprenticeship is to occur. Furthermore, due to the constitutional infirmities inherent in requiring the practical training to occur in Tennessee (see the Commerce Clause analysis below), any ambiguity in the statute should be resolved by reading “in this state” to refer to where the funeral director is licensed, not where the practical training must occur.¹

This interpretation is bolstered by Tenn. Code Ann. § 62-5-303, which provides that “any person engaged [in funeral directing] in this state shall be licensed by the [Tennessee Board of Funeral Directors and Embalmers]” and that it is unlawful to engage in funeral directing without being “duly licensed under the provisions of this chapter.” When this Office addressed the question of whether it is constitutional for a state to mandate that the “practical training and experience” required of dispensing opticians be supervised by a Tennessee licensed professional, we opined that as “an exercise of the legislative police power to regulate public health, safety and welfare, [the requirement of supervision by a Tennessee licensed professional] is subject to the traditional rational basis test.” Op. Tenn. Atty. Gen. 96-078 (April 24, 1996). We then considered the rational basis for this requirement and concluded that no violations of equal protection were inherent in the statute. This Office further opined that the “practical training and experience” alternative that is available “to persons who have been supervised by a Tennessee licensed professional, places an equal burden on Tennessee residents and nonresidents [and] therefore passes muster under a Privileges and Immunities analysis.” *Id.* The above constitutional analysis is the same for apprentice funeral directors, for here the Legislature justified the licensing requirement by stating at the beginning of § 62-5-303:

In order to safeguard life and health and to prevent the spread of contagious diseases, and to improve sanitary conditions and public health generally, it is required that only properly qualified persons shall engage in funeral directing, embalming and operating of a funeral establishment.

Tenn. Code Ann. § 62-5-303(a)(1). Therefore, the Board of Funeral Directors and Embalmers clearly has a rational basis (the public health concerns expressed in § 62-5-303(a)(1)) to insist that

¹ Tenn. Code Ann. § 62-5-305(a)(6)(B), which is the actual focus of this issue, refers only to “such practical training and experience of not less than two (2) years.” The location of where “**such** practical training and experience” is to occur is not specified, but is subject to and implied by the prior subsection, so our analysis and conclusion concerning subsection (a)(6)(A) is the same for subsection (a)(6)(B).

in order to qualify for a license in Tennessee, an applicant's "practical training and experience" must occur under the personal supervision and instruction of a **funeral director with a Tennessee license** granted by the Board.

In exercising this regulatory oversight, the Tennessee Board of Funeral Directors and Embalmers promulgated Rule 0660-1-.01 concerning the registration of apprentices under Tenn. Code Ann. § 62-5-305, which provides as follows:

APPLICANTS FOR FUNERAL DIRECTOR'S LICENSE. Any applicant for a funeral director's license required by T.C.A. § 62-5-305 to register as an apprentice with the Board of Funeral Directors and Embalmers shall complete the form furnished by the Board. The applicant must be at least sixteen (16) years of age, and must be working as a full-time employee (i.e., working at least 40 hours per week) under the personal supervision and instruction of a *licensed funeral director in the State of Tennessee*.

Tenn. Comp. R. & Regs. 0660-1-.01 (1999) (emphasis added). This rule, however, sheds no additional light on the issue as it repeats the same ambiguity as the statute. Therefore, the rule should be subject to the same analysis and interpretation as this Office concluded about Tenn. Code Ann. § 62-5-305(a)(6).

Commerce Clause

In resolving the ambiguity of the statute and the rule, the principle that the Commerce Clause² of the United States Constitution prohibits the states from discriminating against interstate commerce must be given significant weight. During the analysis of a Commerce Clause question in 1978, the United States Supreme Court established a two-prong test for analyzing a state's regulation of interstate commerce. The Court stated that the crucial inquiry is to determine whether the law or regulation at issue "is basically a protectionist measure," i.e., the law discriminates against out-of-state competition in order to benefit local economic interests, "or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental," i.e., the law is not unduly burdensome in that the incidental burden on interstate commerce does not outweigh the legitimate local benefits produced by the regulations. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

Op. Tenn. Atty. Gen. 95-006 (February 8, 1995) (copy attached) directly addressed this issue in the context of whether continuing education for chiropractors must occur within the state. In concluding that the particular provision discriminated against interstate commerce on its face, this Office opined that

² The Commerce Clause states, in relevant part, that "Congress shall have power . . . To regulate Commerce . . . among the several States . . ." U.S. Const. art I, sec. 8. By negative implication, the Constitution limits a State's interference with interstate commerce.

[t]he effect of the requirement that all chiropractic educational license renewal seminars be held in Tennessee creates two discernible burdens: 1) all chiropractors duly licensed by the Tennessee Board of Chiropractic Examiners must attend seminars **in Tennessee** in order to keep their licenses valid; and 2) all producers of chiropractic seminars offering licensing credit **must** conduct such seminars in Tennessee in order to be able to offer prospective seminar attendees Tennessee licensing credit.

First, with respect to chiropractors holding a Tennessee license, the burden on interstate commerce is apparent when a particular chiropractor lives and practices in Tennessee and may be foreclosed from attending seminars outside the State. Although the chiropractor may leave the State to attend seminars, he or she cannot obtain license renewal credit for doing so. The burden increases with those chiropractic practitioners who, although holding valid licenses to practice chiropractic in Tennessee, either live or practice in a jurisdiction outside this State. These practitioners would have to travel into the State of Tennessee to keep their Tennessee licenses valid.

Op. Tenn. Att’y Gen. 95-006 (February 8, 1995) (emphasis in original; the second burden is not relevant to our consideration of the instant matter).

The Supreme Court has further opined that “where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.” *City of Philadelphia*, 437 U.S. at 624 (citations omitted). In our view, a requirement that funeral director apprentices’ practical training (like chiropractic educational seminars) be held only within the geographic boundaries of the State of Tennessee would constitute the sort of “simple economic protectionism” that places an impermissible burden on interstate commerce. *Id.* As our prior opinion concerning the training of chiropractors observed:

There is no similar type of geographic restriction with continuing education for other professions such as the medical or dental professions. *Cf.* Tenn. Code Ann. Section 63-5-107(c)(1) (no requirement that continuing dental education courses must take place within Tennessee). *See also* Op. Tenn. Att’y Gen. 94-010 (February 2, 1994), n.1. Instead, in these professions, a person or entity seeking to produce a continuing education seminar applies to the body entrusted with determining whether to grant state licensing credit. The mere fact that a continuing medical or dental education seminar takes place outside the geographic borders of the State of Tennessee does not, by itself, render the seminar unfit to qualify for the licensing credit. By contrast, the requirement that all continuing chiropractic educational seminars take place within the State of Tennessee means

that all seminars taking place outside this State are not acceptable for the purpose of renewing a Tennessee chiropractic license.

Op. Tenn. Atty. Gen. 95-006 (February 8, 1995).

Provided that the practical training and experience is achieved “under the personal supervision and instruction of a licensed [in Tennessee] funeral director,” we can think of no “legitimate local concerns” that would justify a requirement that the apprenticeship training of funeral directors occur within the borders of Tennessee. We believe the courts would regard such a restriction as simply a protectionist measure intended to benefit local economic interests and would strike it down under the Commerce Clause. However, an interpretation and subsequent application of the statute and the rule to require only that the apprenticeship occur under a **funeral director licensed in this state**, without regard to the geographical location of the apprenticeship, would be grammatically preferable and would also pass constitutional muster.

Therefore, it is the opinion of this Office that the practical training and experience required of applicants for a funeral director’s license may occur outside the State of Tennessee, provided that such apprenticeship occurs under the personal supervision and instruction of a funeral director licensed in Tennessee.

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